INDEX TO PETITION FOR WRIT OR CERTIORARI

Summary, Statement of the Matter Involved 9
Statement Concerning Former Case, Pertinent to this Appeal 15
Statement Disclosing the Basis upon which it is Contended that this Honorable Court has Jurisdiction to review the judgment and Decree in Question.
(A) Statutory Provision 16
(B) The dates of the Opinions, Judgments, and Orders, sought to be reviewed and the date upon which this petition for Certiorari is presented. 16
The Questions Presented.
(A) Questions of Law 17
(B) Question of decision on important questions of Local Law in a way probably in conflict with applicable local decisions 17
(C) Questions of Facts presented 18
(D) Reasons relied on for allowance of the Writ 19
U. S. C. A., Title 28 19
Mass. and S. Construction Co. vs Cane Creek, 155 U. S. 285, 39 L. Ed. 152 19
Salem Company vs Manufacturers Co. 264 U. S. 190, 68 L. Ed. 628 19
Niles-Bement vs Iron Moulder's Union, 254 U. S. 80, 65 L. Ed. 145 19
Torrence vs Shedd, 144 U. S. 527; 36 L. Ed. 528 19
Louisville & Nashville R. R. Co. vs Ide, 114 U. S. 52, 29 L. Ed. 63 19
Fidelity Ins. Co. vs Huntington, 117 U. S. 280; 29 L. Ed. 898 19
Watson vs Chevrolet Motor Co., 68 Fed. 2d 686 (8th Circuit) 19
American Automobile Ins. Co. vs Freundt, 103 Fed. 2d 613 (7th Cir) 20
Tielman vs Russo Asiatic Bank, 51 Fed. 2d 1023 (2nd Cir.) 20
United States vs New Amsterdam Casualty Co., 55 Fed. 2d 377 20
Vandevanter vs C. & O. Ry. Co., 160 U. S. 653; 53 S. Ct. 230 67 L. Ed. 443. 20
110 A. L. R. 189 (Citing Federal Decisions) 20
Clay vs Field,, 138 U. S. 479 20
Stemmler vs McNeill, et al., 102 Fed. 660 (Cir. Court N. C.) 20
Murphy et al. vs Johnson, 49 Fed. 2d 410 20
Allen vs Garnett, 100 Fed 2d 555 (Tenth Circuit) 20
Hughes vs United States, 71 U. S. 232 20
Henrietta S. Gould Administratrix vs Evansville & Crawfordville Railway Co. U. S. Supreme Court reports, 23 L. Ed. 416 20
Homer vs Brown, 14 Ed. 975 21
Gillmer vs Morris, 46 Fed. 333 (Circuit Court Ala.) 21
McClung vs Hohl, 10 K. A. 93; 61 Pac. 507 21
Penquite vs General Accident and Life Ins. Co., 126 Kan 511; 268 Pac. 851 21
Burris vs Burris, 34 Pac. 2d 127 21
Petitioner's Brief annexed here to is made a part of this petition 21
Prayer for relief 22

AUTHORITIES CITED

Allen vs Garnett, 100 Fed 2d 555 (Tenth Circuit) 20

American Automobile Ins. Co. vs Freundt, 103 Fed. 2d 613 (7th Cir) 20

Burris vs Burris, 34 Pac. 2d 127 21

Clay vs Field,, 138 U. S. 479 20

Fidelity Ins. Co. vs Huntington, 117 U. S. 280; 29 L. Ed. 898 19

Gillmer vs Morris, 46 Fed. 333 (Circuit Court Ala.) 21

Henrietta S. Gould Administratrix vs Evansville & Crawfordville Railway Co. U. S. Supreme Court reports, 23 L. Ed. 416 20

Hughes vs United States, 71 U. S. 232 20

Homer vs Brown, 14 Ed. 975 21

Louisville & Nashville R. R. Co. vs Ide, 114 U. S. 52; 29 L. Ed. 63 19

Mass. and S. Construction Co. vs Cane Creek, 155 U. S. 285, 39 L. Ed. 152 19

Murphy et al. vs Johnson, 49 Fed. 2d 410 20

McClung vs Hohl, 10 K. A. 93; 61 Pac. 507 21

Niles-Bement vs Iron Moulder's Union, 254 U. S. 80, 65 L. Ed. 145 19

Penquite vs General Accident and Life Ins. Co., 126 Kan 511; 268 Pac. 851 21

Stemmler vs McNeill, et al., 102 Fed. 660 (Cir. Court N. C.) 20

Salem Company vs Manufacturers Co. 264 U. S. 190, 68 L. Ed. 628 19

Tielman vs Russo Asiatic Bank, 51 Fed. 2d 1023 (2nd Cir.) 20

Torrence vs Shedd, 144 U. S. 527; 36 L. Ed. 528 19

United States vs New Amsterdam Casualty Co., 55 Fed. 2d 377 20

Vandevanter vs C. & O. Ry. Co., 160 U. S. 653; 53 S. Ct. 230 67 L. Ed. 443. 20

Watson vs Chevrolet Motor Co., 68 Fed. 2d 686 (8th Circuit) 19

TEXTBOOKS

110 A. L. R. 189 (Citing Federal Decisions) 20

U. S. C. A., Title 28 19

INDEX TO BRIEF

The Opinions and Orders of the Local Courts 23
Grounds on which jurisdiction of this Honorable Court is invoked 24
Reasons relied on for the allowance of the Writ 24
Concise Statement of the Case 24
Assigned Errors intended to be urged 25
Argument and Authorities 25
First Proposition 25
Second Proposition 55
Lincoln Mine Operating Company vs Manufacturers Trust Co., 17 Fed. Supp. 499 27
Wells vs Missouri Pacific Railway Co. 97 Fed. 2d 578 27
Centerville State Bank vs National Surety Co., 37 Fed. 2d 338 Reversing district court 27 Fed 2d 522 27
Kansas 1923, 62-2002 et seq. 27
Rand vs Herculese Powder Company, Inc., 28 Fed. 2d 131 28
Wright vs Missouri Pacific Railway Company, 98 Fed. 2d 34 28
Fairfax Oklahoma vs Ashbrook, 3 Fed. Supp. 345 28
Stemmler vs McNeill et al., (Cir. Court N. Carolina) 102 Fed. 660 29
United States vs Flournoy Live Stock and Real Estate Co. et al. (Circuit Court, Nebraska) 69 Fed. 886 29
Walker vs Powers, 104 U. S. 245 30
Story, Eq. Pl. 271 30
Story, Eq. Pl. *285 30
110 A. L. R. 188 30
Pringle vs Storrow, 49 A. L. R. page 1222 30
Cochran vs Montgomery County, 199 U. S. 260; 50 L. Ed. 182; 26 Supp. Ct. Rep. 58 4 Ann. Cas. 451 31
General Investment Co. vs Lake Shore & M. S. R. Company 260 U. S. 261; 67 L. Ed. 244; 43 Sup. Ct. Rep. 106. 31
Ayres vs Wiswall 112 U. S. 187 31
Fidelity Ins. Trust & Safe Deposit Co. vs Huntington, 117 U. S. 280 31
Putnam vs Ingraham 114 U. S. 57 31
Louisville & N. R. Co., vs Wangelin, 132 U. S. 599 31
Riser vs Railroad Co. 116 Fed. 215 31
Murphy et al, vs Johnson et al., 49 Fed. 2d 410 32
Massachusetts & S. Construction Company vs Cane Creek, 155 U. S. 285; 39 L. Ed. 152 33
Wilson vs Oswego Township 151 U. S. 56; 38 L. Ed. 70 34
Salem Company vs Manufacturers' Company 264 U. S. 190; 69 L. Ed. 628, 31 A. L. R. 867 34
Niles-Bement vs Iron Moulder's Union 254 U. S. 80; 65 L. Ed. 145 34
Myer Drug Co. vs Dollar, 44 Fed. 2d 57 35
Torrence vs Shedd, 144 U. S. 527; 36 L. Ed. 528 35
Davidson vs Montana-Dakota Power Co., 22 Fed. 2d 688 35
Boatman's Bank vs Fritzlen 135 Fed. 650 35

INDEX TO BRIEF (Continued)

City of Winfield vs Wichita Natural Gas Co. 267 Fed. 47 35
Wright vs Dunn (Tex) 11 S. W. 300 37
McCoy vs Pease, (Tex) 48 S. W. 208 37
Carmichael vs Ballard (Tex) 31 S. W. 80 39
Grant vs Hill, (Tex) 30 S. W. 952 37
Edwards vs Gill (Tex) 23 S. W. 742 37
Woll vs Voigt (Minn) 117 N. W. 608; 23 L. R. A. (NS) 270 37
Wayzata vs Great Northern R. Co. 49 N.W. 205; 23 L.R.A. (NS) 37
Ophir Silver Mining Co. vs Superior Court, 147 Cal. 467; 82 Pac. 70 38
Maces vs Mayfield et al. 10 Fed. 2d 231 38
Citizens and Southern Bank of South Carolina vs Pine Forrest Inn Company et al., 31 Fed. 2d 302 39
Ames vs Chicago S. F. Railway Company et al., 39 Fed. 881 39
Bryan et al, vs Borriger, et al., 251 Fed. 328 39
Perrin administrator vs Lepper et al., 26 Fed. 545 39
O'Neil Insurance Commissioner vs Birdseye et al., 244 Fed. 254 39
McNaull vs West Indian Securities Corporation, 178 Fed. 308 40
Miller vs Clifford, 133 Fed. 880 40
Westside Railway Company vs California, 202 Fed. 331 40
Baillie vs Backus, 230 Fed. 711 41
G. S. 1935, Section 60-411 41
Wohlforth vs Wohlforth, 123 Kansas 142; 254 P. 334 41
Braden vs Neal 132 Kansas 387; 295 P. 678 41
G. S. 1935 Section 60-601 41
Scantlin vs Allison 32 Kansas 3764 P. 618 42
Barnsdall Refining Company vs Iola City Oil and Supply Co., 137 Kansas 247: 20 P. 2d 473 42
G. S. 1935 Section 60-512 42
Theissen vs Weber, 128 Kan. 556; 278 P. 770 42
Price vs Carmean 136 Kansas 744. 18 P. 197 42
G. S. 1935 Section 60-501 42
Martin vs Battey, 87 Kans. 582; 125 P. 88 42
Randall vs Ross, 94 Kans. 198; 147 P. 72 42
Black vs Black, 131 Kansas 154; 289 P. 480 43
G. S. Section 60-201 43
Kelso vs Norton, 65 K 778 ... 80 P 896 43
Investment Company vs Burdick, 67 K. 329; 78 P. 781 43
Mayor etc. of New York vs New Jersey Steamboat Trans. Co. et al. 24 Fed. 817 44
Johnson et al. vs Jordan et al., 22 Fed. Supp. 286 45
Louisville and Nashville Ry. Co. vs Ide, 114 U.S. 52, 29 L. Ed. 63 46
Torrence vs Shedd, 144 U. S. 527; 36 L. Ed. 528 46
Fidelity Insurance Co. vs Huntington, 117 U.S. 280; 29 L. Ed. 898 46
Ferris vs Wray et al., 22 Fed. Supp. 135 46
Watson vs Chevrolet Motor Co., 68 Fed. 2d 686 46
Boehne vs Southwestern Bell Telephone Co., et al., 10 Fed. Supp' 788 46

INDEX TO BRIEF (Continued)

28 U. S. C. A., Paragraph 71 47
Harrison vs Harrison 5 Fed. 2d 1001 47
Fidelity Insurance Co. vs Huntington 117 U. S. 280; 29 L. Ed. 898 47
Campbell et al., vs Milliken et al, 119 Fed. 981 48
Finn, Sheriff vs Rotating Valve Corporation 25 Fed. Supp. 206 48
American Automobile Ins. Co. vs Freundt, et al. 103 Fed. 2d 613 48
Layley et al. vs Whities et al., 24 Fed. Supp. 698 49
First National Bank of Corrdell vs City Guaranty Bank of Hobart
174 Ok. 545; 51 P. 2d 573 49
Erie Railroad Co. vs Tompkins 304 U. S. 64; 82 L. Ed. 118 49
114 A. L. R. 1487 49
Ruhlin vs Nem York Life Ins. Co. 304 U. S. 302; 82 L. Ed. 1290 49
Hoffman vs Metz et al., 31 Fed. Supp. 204 49
189 Fed. 247 vs Sharp 50
Hogue et ux. vs Strickler Land and Timber Co. 69 Fed. 2d 167 and
70 Fed. 2d 722, Certiorari denied in 293 U. S. 591; 78 L. Ed. 868 50
Lynes vs Standard Oil Co., et al., 300 F. 812 50
Tillmann vs Russo Asiatic Bank 51 Fed. 2d 1023 (Second Circuit) 51
Bagwell vs Southern Railroad Co., et al., 21 Fed. Supp. 751 51
Forrest vs Southern Railway Co. et al., 20 Fed. Supp. 851 52
McCaffrey et al., vs Wilson and Co, et al, 10 Fed. 2d 368 52
Vandeventer vs C. and O. Railway Co. 160 U. S. 653; 43 S. Ct. 230
67 L. Ed. 443 52
Kunn s Pacific Mutual Life Ins. Co. of California 37 Fed. Supp 100 53
Rule 56 Federal Practice 54
Vol. 1 Federal Rules 54
United States vs Turner Milk Co., 1 F. R. D. page 643 54
General Rule 30 Am. Jur. 944 Sec. 208 Judgments 56
Allen vs Garnett, 100 Fed. 2d 555 56
United States vs New Amsterdam Casualty Co. 55 Fed. 2d 377 57
Gilam vs Rives 10 Pet. 298; 9 L. Ed. 432 57
Hughes vs United States. 71 U. S. (4 Wall) 232; 18 L. Ed. 303;
Freeman on Judgments Sec. 747 57
Henrietta S. Gould, Executrix, vs Evansville & Crawfordville Ry. Co.
U. S. Supreme Court Rep. 23 L. Ed. 416; Sec. 2 of Syl. 57
Homer vs Brown, 14 L. Ed. 975 57
Gilmer vs Morris, 46 Fed. 333 58
McClung vs Hohl ,10 K. A. 93; 61 Pac. 507 58
Penquite vs General Accident & Life Ins. Co. 126 Kan. 511; 268 Pac.
126 Kan. 511; 268 Pac. 851 58
Section 1 of Syllabus 58
Penquite vs General Accident & Life Ins. Co. 126 Kan. 511:
268 Pac. 851, 1st syl. 60
34 C. J. 797-798 61
McLaughlin vs Doane, 40 Kan. 392; 19 Pac. 353 61
McClung vs Hohl 10 Kan Ap. 93; 61 Pac. 507 61
Burris vs Burris Supreme Court of Kan. 34 Pac. 2d 127 Sec. 6 of syl 61

INDEX TO BRIEF (Continued)

Penique vs General Accident Fire & Life Assurance Corp. 126 Kan. 511; 286 Pac. 851 62
Bonnifield vs Price 1 Wyo. 223 62
Morrell vs Morgan 65 Cafifornia 575 62
Birch vs Funk 2 Mat. (Ky) 544 62
Goddard vs Security Title Ins. and Guaranty Co. (Cal. Supreme Ct) 92 Pac. 2d 804 Section 7 of the syllabus 63
106 A. L. R. 444 63
Freeman on Judgments Vol 2 page 1575 63
West vs American Telephone & Telegraph Co. 311 U. S. 223; 132 A. L. R. 956 65
Judiciary Act 28 U. S. C. A. Sec. 725 65
106 A. L. R. Page 444 65
Hickey vs Johnson, 9 Fed. 2d 498 65
St Louis S. W. R. Co. vs S. H. Bolinger & Co. 17 Fed 2d 924 66
United States vs New Amsterdam Casualty Co. 55 Fed. 2d 377 66
Penquite vs Ins Co 126 Kan. 511; 268 Pac. 851 66
Burris vs Burris, 140 Kan. 208; 34 Pac. 2d 127 66
Beloit Bldg. Co. vs Quinn, 141 Kan. 762; 44 Pac. 2d 232. 66
13 A. L. R. Page 1113 66
Gilman vs Rives 9 L. Ed. 432 66
Aurora vs West, 19 L. Ed. 42 66
Gould vs Evansville & C. R. Co. 91 U. S. 526 66
Spicer vs United States 5 Ct. Cl. 34 66
Smith vs McNeal, 109 U. S. 426 66
Gilmer vs Morris . 46 Fed. 333 66
Haug vs Great Northern R. Co. 102 Fed. 74 66
Miller vs Margerie 170 Fed. 710 66
United States vs Dwight Mfg Co. 213 Fed. 522 66
McClung vs Hohl 10 Kan. Ap. 93; 61 Pac. 501 (Kansas) 66
13 A. L. R. 1117 66
Statutes of Limitations (Wyo) 67
13 A. L. R. 1117, Birch vs Funk (Ky) 67
Melvin vs Melvin 97 Pac. 696 (Cal.) 67
Burnett vs Marrs, 125 Pac. 838 (Oregon 67
Freeman on Judgments 4th Ed. Sec. 260 67
23 Cyc. 1126 67
Richards vs American Union Bank 253 N. Y. 166; 69 A. L. R. 667 68
Freeman on Judgments 3rd Add'n Revised Sec. 263 70
Freeman on Judgments Sec. 249 71
Conclusion 72

AUTHORITIES CITED IN BRIEF

Allen vs Garnett, 100 Fed. 2d 555 56
American Automobile Ins. Co. vs Freundt, et al. 103 Fed. 2d 613 48
Ames vs Chicago S. F. Railway Company et al., 39 Fed. 881 39
Aurora vs West, 19 L. Ed. 42 66
Ayres vs Wiswall 112 U. S. 187 31
Rand vs Herculese Powder Company Inc. 28 Fed. 2d 131 28
Bagwell vs Southern Railroad Co., et al., 21 Fed. Supp. 751 51
Baillie vs Backus, 230 Fed. 711 41
Barnsdall Refining Company vs Iola City Oil and Supply Co.,
Beloit Bldg. Co. vs Quinn, 141 Kan. 762; 44 Pac. 2d 232. 66
Birch vs Funk 2 Mat. (Ky) 544 62
Black vs Black, 131 Kansas 154; 289 P. 480 43
Boatman's Bank vs Fritzlen 135 Fed. 650 35
Boehne vs Southwestern Bell Telephone Co. et al. 10 Fed. Supp. 788 46
Bonnifield vs Price 1 Wyo. 223 62
Braden vs Neal 132 Kansas 387; 295 P. 678 41
Bryan et al, vs Borriger, et al., 251 Fed. 328 39
Burnett vs Marrs, 125 Pac. 838 (Oregon 67
Burris vs Burris, 140 Kan. 208; 34 Pac. 2d 127 66
Campbell et al., vs Milliken et al, 119 Fed. 981 48
Carmichael vs Ballard (Tex) 31 S. W. 80 39
Centerville State Bank vs National Surety Co., 37 Fed. 2d 338
Reversing district court 27 Fed 2d 522 27
City of Winfield vs Wichita Natural Gas Co. 267 Fed. 47 35
Citizens and Southern Bank of South Carolina vs Pine Forrest
Cochran vs Montgomery County, 199 U. S. 260; 50 L. Ed. 182;
26 Supp. Ct. Rep. 58 4 Ann. Cas. 451 31
Davidson vs Montana-Dakota Power Co., 22 Fed. 2d 688 35
Edwards vs Gill (Tex) 23 S. W. 742 37
Erie Railroad Co. vs Tompkins 304 U. S. 64; 82 L. Ed. 118 49
Forrest vs Southern Railway Co. et al., 20 Fed. Supp. 851 52
Fairfax Oklahoma vs Ashbrook, 3 Fed. Supp. 345 28
Ferris vs Wray et al., 22 Fed. Supp. 135 46
Fidelity Insurance Co. vs Huntington, 117 U.S. 280; 29 L. Ed. 898 46
Fidelity Insurance Co. vs Huntington 117 U. S. 280; 29 L. Ed. 898 47
Fidelity Ins. Trust & Safe Deposit Co. vs Huntington, 117 U. S. 280 31
Finn, Sheriff vs Rotating Valve Corporation 25 Fed. Supp. 206 48
First National Bank of Corrdell vs City Guaranty Bank of Hobart
174 Ok. 545; 51 P. 2d 573 49
General Investment Co. vs Lake Shore & M. S. R. Company
260 U. S. 261; 67 L. Ed. 244; 43 Sup. Ct. Rep. 106. 31
Gilman vs Rives 9 L. Ed. 432 66
Gilam vs Rives 10 Pet. 298; 9 L. Ed. 432 57
Gilmer vs Morris , 46 Fed. 333 66
Gilmer vs Morris, 46 Fed. 333 58
Goddard vs Security Title Ins. and Guaranty Co. (Cal. Supreme Ct)

AUTHORITIES CITED IN BRIEF (Continued)

92 Pac. 2d 804 Section 7 of the syllabus 63
Henrietta S. Gould, Executrix, vs Evansville & Crawfordville Ry. Co.
U. S. Supreme Court Rep. 23 L. Ed. 416; Sec. 2 of Syl. 57
Gould vs Evansville & C. R. Co. 91 U. S. 526 66
Grant vs Hill, (Tex) 30 S. W. 952 37
Investment Company vs Burdick, 67 K. 329; 78 P. 781 43
Haug vs Great Northern R. Co. 102 Fed 74 66
Harrison vs Harrison 5 Fed. 2d 1001 47
Hickey vs Johnson, 9 Fed. 2d 498 65
Hoffman vs Metz et al., 31 Fed. Supp. 204 49
Hogue et ux. vs Strickler Land and Timber Co. 69 Fed. 2d 167 and
70 Fed. 2d 722, Certiorari denied in 293 U. S. 591; 78 L. Ed. 868 50
Homer vs Brown, 14 L. Ed. 975 57
Hughes vs United States. 71 U. S. (4 Wall) 232; 18 L. Ed. 303;
Freeman on Judgments Sec. 747 57
Johnson et al. vs Jordan et al., 22 Fed. Supp. 286 45
Kelso vs Norton, 65 K 778 ..... 80 P 896 43
Kuhn vs Pacific Mutual Life Ins. Co. of Calif. 37 Fed. Supp. 100 53
Layley et al. vs Whities et al., 24 Fed. Supp. 698 49
Lincoln Mine Operating Company vs Manufacturers Trust Co.,
17 Fed. Supp. 499 27
Louisville & N. R. Co., vs Wangelin, 132 U. S. 599 31
Louisville and Nashville Ry. Co. vs Ide, 114 U.S. 52, 29 L. Ed. 63 46
Lynes vs Standard Oil Co., et al., 300 F. 812 50
Maces vs Mayfield et al. 10 Fed. 2d 231 38
Inn Company et al., 31 Fed. 2d 302 39
Martin vs Battey, 87 Kans. 582; 125 P. 88 42
Massachusetts & S. Construction Company vs Cane Creek,
155 U. S. 285; 39 L. Ed. 152 33
Mayor etc. of New York vs New Jersey Steamboat Trans. Co. et al.
24 Fed. 817 44
McCaffrey et al., vs Wilson and Co., et al, 10 Fed. 2d 368 52
McCoy vs Pease, (Tex) 48 S. W. 208 37
McClung vs Hohl 10 Kan Ap. 93; 61 Pac. 507 61
McClung vs Hohl, 10 Kan. Ap. 93; 61 Pac. 501 (Kansas) 66
McClung vs Hohl ,10 K. A. 93; 61 Pac. 507 58
McLaughlin vs Doane, 40 Kan. 392; 19 Pac. 353 61
McNaull vs West Indian Securities Corporation, 178 Fed. 308 40
Melvin vs Melvin 97 Pac. 696 (Cal.) 67
Miller vs Clifford, 133 Fed. 880 40
Miller vs Margerie 170 Fed. 710 66
Morrell vs Morgan 65 Cafifornia 575 62
Murphy et al, vs Johnson et al., 49 Fed. 2d 410 32
Myer Drug Co. vs Dollar, 44 Fed. 2d 57 35
Niles-Bement vs Iron Moulder's Union 254 U. S. 80; 65 L. Ed. 145 34
O'Neil Insurance Commissioner vs Birdseye et al., 244 Fed. 254 39
Ophir Silver Mining Co. vs Superior Court, 147 Cal. 467; 82 Pac. 70 38

AUTHORITIES CITED IN BRIEF (Continued)

Penquite vs General Accident & Life Ins. Co. 126 Kan. 511: 268 Pac. 851, 1st syl. 60
Penquit vs Ins. Co., 126 Kan. 511; 268 Pac. 851 66
Penquite vs General Accident & Life Ins. Co. 126 Kan. 511; 268 Pac. 126 Kan. 511; 268 Pac. 851 58
Penique vs General Accident Fire & Life Assurance Corp. 126 Kan. 511; 286 Pac. 851 62
Perrin administrator vs Lepper et al., 26 Fed. 545 39
Pringle vs Storrow, 49 A. L. R. page 1222 30
Putnam vs Ingraham 114 U. S. 57 31
Rand vs Herculese Powder Company, Inc., 28 Fed. 2d 131 28
Randall vs Ross, 94 Kans. 198; 147 P. 72 42
Richards vs American Union Bank 253 N. Y. 166; 69 A. L. R. 667 68
Ruhlin vs Nem York Life Ins. Co. 304 U. S. 302; 82 L. Ed. 1290 49
Riser vs Railroad Co. 116 Fed. 215 31
Salem Company vs Manufacturers' Company 264 U. S. 190; 69 L. Ed. 628, 31 A. L. R. 867 34
Scantlin vs Allison 32 Kansas 3764 P. 618 42
Smith vs McNeal, 109 U. S. 426 66
Spicer vs United States 5 Ct. Cl. 34 66
Stemmler vs McNeill et al., (Cir. Court N. Carolina) 102 Fed. 660 29
St Louis S. W. R. Co. vs S. H. Bolinger & Co. 17 Fed 2d 924 66
Theissen vs Weber, 128 Kan. 556; 278 P. 770 42
Tillmann vs Russo Asiatic Bank 51 Fed. 2d 1023 (Second Circuit) 51
Torrence vs Shedd, 144 U. S. 527; 36 L. Ed. 528 46
Torrence vs Shedd, 144 U. S. 527; 36 L. Ed. 528 35
United States vs Dwight Mfg. Co. 213 Pac. 522 66
United States vs Flournoy Live Stock and Real Estate Co. et al. (Circuit Court, Nebraska) 69 Fed. 886 29
United States vs New Amsterdam Casualty Co. 55 Fed. 2d 377 66
United States vs New Amsterdam Casualty Co. 55 Fed. 2d 377 57
United States vs Turner Milk Co., 1 F. R. D. page 643 54
Vandeventer vs C. and O. Railway Co. 160 U. S. 653; 43 S. Ct. 230 67 L. Ed. 443 52
Watson vs Chevrolet Motor Co., 68 Fed. 2d 686 46
Wayzata vs Great Northern R. Co. 49 N.W. 205; 23 L.R.A. (NS) 37
Walker vs Powers, 104 U. S. 245 30
Wells vs Missouri Pacific Railway Co. 97 Fed. 2d 578 27
West vs American Telephone & Telegraph Co. 311 U. S. 223; 132 A. L. R. 956 65
Westside Railway Company vs California, 202 Fed. 331 40
Wilson vs Oswego Township 151 U. S. 56; 38 L. Ed. 70 34
Wohlforth vs Wohlforth, 123 Kansas 142; 254 P. 334 41
Woll vs Voigt (Minn) 117 N. W. 608; 23 L. R. A. (NS) 270 37
Wright vs Missouri Pacific Railway Company, 98 Fed. 2d 34 28
Wright vs Dunn (Tex) 11 S. W. 300 37

AUTHORITIES CITED IN BRIEF (Continued)

TEXTBOOKS

General Rule 30 Am. Jur. 944 Sec. 208 Judgments 56
Freeman on Judgments Sec. 249 71
Freeman on Judgments 3rd Add'n Revised Sec. 263 70
Freeman on Judgments 4th Ed. Sec. 260 67
Freeman on Judgments Vol 2 page 1575 63
G. S. Section 60-201 43
G. S. 1935 Section 60-501 42
G. S. 1935 Section 60-512 42
G. S. 1935, Section 60-411 41
13 A. L. R. 1117 66
13 A. L. R. Page 1113 66
106 A. L. R .Page 444 65
106 A. L. R. 444 63
110 A. L. R. 188 30
114 A. L. R. 1487 49
Judiciary Act 28 U. S. C. A. Sec. 725 65
23 Cyc. 1126 67
G. S. 1935 Section 60-601 41
28 U. S. C. A., Paragraph 71 47
Story, Eq. Pl. 271 30
Story, Eq. Pl. *285 30
137 Kansas 247: 20 P. 2d 473 42
Kansas 1923, 62-2002 et seq. 27
Statutes of Limitations (Wyo.) 67
13 A. L. R. 117, Birch vs Funk (Ky) 67
Rule 56 Federal Practice 54
Vol. 1 Federal Rules 54
Section 1 of Syllabus 58
34 C. J. 797-798 61

IN THE

Supreme Court of the United States

October Term, 1942

No. .....

BEN PRESTON, PETITIONER

V

BUNKER HILL STATE BANK, Bunker Hill, Kansas, Et Al., RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES, AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

This petition of Ben Preston, Petitioner, respectfully shows to this Honorable Court:

(A) SUMMARY, STATEMENT OF THE MATTER INVOLVED

This action was filed in the District court of Russell County, State of Kansas, to recover the oil and gas leasehold estate, and oil and gas rights in and under sixty Sections of real estate located in Russell County, Kansas and to quiet

title in said mineral rights in the Plaintiff as against the lessee Defendants, Respondents herein, who had taken subsequent leases upon portions of the land involved and brought in production on the same. The petition in the State Court was filed on May 16, 1941 against the Defendants consisting of thirty-three corporations and two-hundred and thirty-three individuals. The Petition shows on its face and it is admitted that the Plaintiff and seven of the corporate Defendants and all of the individual Defendants are residents of the State of Kansas. The remaining twenty-six corporate Defendants are nonresidents of the State of Kansas having been created in foreign states.

The petitioner claims the lease hold estate under said block of acerage by reason of the following instrument (T20)

> "Escrow Agreement between Focks Drilling and Manufacturing Company of Wichita, Kansas hereinafter called party of the first part, and the Bunker Hill State Bank, hereinafter called party of the second part.
>
> "Whereas, party of the first part desires to obtain leases on a block of acreage situated in Russell County, Kansas, Townships 13 and 14, Ranges 12 and 13, for the purpose of drilling a test well for oil and gas, party of the first part agrees to begin drilling operations for test well within ninety days from time block is completed, and continue operations until well is completed, unavoidable accidents excepted. Party of the second part agrees to keep possession of leases taken until party of the first part has erected derrick, places machinery and spudded in test well. Party of the second part will then deliver all leases to party of the first part.

(SEAL) FOCKS DRILLING AND MFG. CORP.
By F. A. FOCKS, Pres.,
Party of the First Part.

(SEAL) BUNKER HILL STATE BANK,
By M. K. MATHEWS,
Party of the Second Part.

"Subscribed and sworn to before me this 25th day of June, 1921. F. B. Hoopman, Notary Public. My commission expires Jaunary 10, 1925, (Not. Seal, F. B. Hoopman)".

This agreement was filed for record in the office of the registrar of deeds in Russell County, Kansas, on December 17, 1923.

The petition further alleges that pursuant to this Escrow Agreement, the land owners executed oil and gas leases for a term of five years and as long thereafter as oil and gas were produced therefrom, and placed them with the Escrow holder, the Bunker Hill State Bank, to be delivered upon the commencement of the well as stated in the agreement. That due to the inability of the lessee, Focks Drilling and Manufacturing Corporation, to assemble the leases within the time stated an extension agreement was entered into by the land owners, being the lessors, and the lessee, whereby the commencement of the drilling of the well was extended for a term of two years from September 21, 1922, (T 22).

On March 4, 1924, the Focks Drilling and Manufacturing Corp. sold and assigned all of its rights in the Escrow Agreement and the leases referred to therein to the petitioner, Ben Preston, which assignment was filed for record in the office of the registrar deeds of Russell County, Kansas on July 23, 1926 (T 23).

On March 14, 1924, the petitioner commenced the drilling of the well within the terms of the Escrow Agreement and the extention thereof after which he made demand upon the escrow bank for the delivery of the leases which the bank refused to do. He drilled the well 500 feet deep and made a further demand for the leases and the bank, instead of delivering them to the petitioner surrendered them back to the land owners and in turn the bank took new leases from some of the land owners in its name as lessee and prevented the petitioner herein from obtaining possession of the leases under the terms of the Escrow Agreement.

Then follows allegation as to the acts performed by the petitioner, his agents and attorneys, and allegations as to the money expended by him from time to time up to the present date in trying to recover possession of these leases from the farmers and the bank; and his failure to do so. The petition sets out the litigation that has ensued concerning all or some part of the land covered by the leases and this Escrow Agreement in the State and Federal Courts of Kansas which litigation commenced on March 21, 1924 and was concluded on December 16, 1940 being 17 seperate cases some of which were pending during all of the period of time covered herein, (T 43-53). It further discloses that the lessor Defendants in this action executed and delivered to the lessee Defendants subsequent or top oil and gas leases on some or all of the property involved and described in the Escrow Agreement thereby clouding the title of the Plaintiff in the same and that said top leases are now in existance of record and some of the Defendants have brought in production upon portions of the property by reason thereof.

The petition recites that not only did the lessee Defendants, Respondents herein, have constructive or record knowledge of plaintiff's rights in the minerals under this block of

acreage but that actual knowledge was given to them by registered notices mailed in 1930 and other notices mailed again to some of the Defendants in 1937 and prior to the time, the Respondents receiving said notices had explored or developed their top leases for oil and gas.

The Petition closes with the prayer (T 61-62) that petitioner be adjudged to be the equitable owner of the lease hold estate upon the real estate discribed in the Escrow Agreement and that he have judgment for the specific performance of the Escrow Agreement and extension thereof, reserving, however, to the lessors or land owner defendants, the 1/8 royalty interest in the oil and gas right under the land and that he recover judgment for the possession of the real estate involved for the purpose of exploring and developing the same for oil and gas and that the lessee Defendants be adjudged to be trustees for the plaintiff for the oil and gas produced from the premises by virtue of leases taken by said lessees since March 15, 1924, and an accounting as against the lessees so producing oil and gas. Or in the alternative that the subsequent leases now claimed or held by the lessee Defendants be cancelled and removed as a cloud upon Plaintiffs title to the land involved and that Plaintiffs right title and interest therein by reason of the Escrow Agreement and the leases executed in connection therewith be adjudged prior and superior to the claims of the said lessee Defendants and for general relief quieting plaintiff's title in said property as against the adverse claims of all the Defendants.

Attached to the petition as exhibits are, a copy of the lease, and copies of the notices registered to the Defendants. Before answer date in the State Court, seven Corporate non-resident Defendants Filed petitions for removal of this cause to the United States District Court of Kansas, First Division; they are:

Magnolia Petroleum Co., Stanolind Oil and Gas Company, Skelley Oil Company, The Texas Company, the Cities Service Oil Company, Cities Service Gas Co., and Mid-Continent Petroleum Corporation.

These removing Defendants together with others, after the cause had been docketed in the United States District Court of Kansas, filed motions for summary judgment.

Petitioner filed his motion to remand this cause to the State Court of Kansas (T 186-190) contending among other things, that there existed in the action no sufficient diversity of citizenship between the Plaintiff and the removing Defendants so as to place judisdiction of the matter in the Federal Court and that this action does not involve a separable controversy between a citizen of the State of Kansas and a Citizen of another state so as to entitle the removal of this action from the state into the Federal Court of Kansas.

On August 2, 1941, petitioner's motion to remand, was presented and argued before the United States District Court of Kansas, Honorable Richard J. Hopkins presiding, at the conclusion of which the court entered its order denying the motion and retaining judisdiction of the cause. Thereupon, the Court heard the various motions for summary judgment, after which it entered its order sustaining each of said motions, and ordered the case dismissed at Plaintiff's cost (T 195-202). Exceptions were saved and thereafter in due time and manner, an Appeal was perfected from this final order to the Circuit Court of Appeal.

Thereafter, on May 5, 1942, the United States Circuit Court of Appeals, Tenth Circuit, entered its judgment affirming the judgment of the lower court overruling petitioner's motion to remand this cause to the State Court and sustain-

ing the various motions filed by various Respondents for summary judgment (128 Fed. 2d 162). The petitioner filed a petition for rehearing in the Circuit Court of Appeals within due time which was denied by the Court on June 22, 1942 from which judgment this Appeal is prosecuted.

STATEMENT CONCERNING FORMER CASE, PERTINENT TO THIS APPEAL.

On December 30, 1938, Ben Preston commenced an action in the United States District Court of Kansas, First Division, against practically the same Defendants as are involved in the present action seeking to recover his mineral rights under the land described in the same Escrow Agreement. Motions for summary judgment were filed by certain of the Defendants in that case, and on August 7, 1939, the United States District Court sustained these motions and dismissed the case. Preston filed an appeal from this order in the Tenth Circuit Court of Appeals which was docketed in said court as case No. 2022. On April 5, 1940. The Circuit Court announced that no appealable order had been entered by the trial court, and the case was remanded to the United States District Court of Kansas for further proceedings.

On April 26, 1940, the matter came on for hearing before the Federal District Court of Kansas, at which time, the Plaintiff presented his written applications for leave to file an amended complaint in the cause, which request was thereafter, on May 13, 1940, denied and the Court thereupon entered its final order dismissing the entire action (T 124-125) In due time, an appeal was taken from this order to the Circuit Court of Appeals, Tenth Circuit and docketed in said court as Case No. 2142.

On June 28, 1940, the Circuit Court delivered its opinion in Case No. 2142, affirming the decision of the United States District Court of Kansas, dismissing the Plaintiff's action and denying him the right to file an amended complaint, (113 Fed. 2d. 311), (T 125-129). A petition for rehearing was denied by the Circuit Court on August 9, 1940.

On November 8, 1940, Ben Preston filed in the United States Supreme Court his petition for a writ of Certiorari to the United States Circuit Court of Appeals, (T 130-166) Tenth Circuit, seeking a review and reversal of the lower court's action which petition was denied on December 16, 1940, by the United States Supreme Court (311 U. S. 712; 85L Ed. 463)

NO. II—STATEMENT DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THIS HONORABLE COURT HAS JURISDICTION TO REVIEW THE JUDGMENT AND DECREE IN QUESTION.

(A)—STATUTORY PROVISION

The jurisdiction of this honorable court is invoked under the provisions of Section 240 A of the Judicial Code as amended by the Act of February 13, 1925. U. S. C. A., Title 28, Section 347.

(B) THE DATES OF THE OPINIONS, JUDGMENTS, AND ORDERS, SOUGHT TO BE REVIEWED AND THE DATE UPON WHICH THIS PETITION FOR CERTIORARI IS PRESENTED.

The filing of this petition for a writ of certiorari is timely and is made within the period prescribed by Section 8 A of the Act of February 13, 1925. U.S.C.A., Title 28, Section 350, and by Rules (38-2) of the Revised Rules of this Court, effective February 27, 1939.

The date of the order of submission and the order of the Tenth Circuit Court of Appeals, affirming the judgment of the United States District Court for the State of Kansas, First Division, overruling petitioner's motion to remand this action to the State Court of Kansas, from which it had been removed, and sustaining the various motions filed by the respondents for summary judgment, to be reviewed by this honorable court, is May 5, 1942.

No. III—THE QUESTIONS PRESENTED.

(A)—QUESTIONS OF LAW

Did the Circuit Court err in affirming the decision of the Federal District Court of Kansas in refusing to remand this action to the State Court of Kansas?

Did the Circuit Court err in affirming the decision of the Federal District Court of Kansas, sustaining appellees motions for summary judgment on the pleadings and entering judgment on the merits for the appellees and dismissing the action?

The Circuit Court in refusing to order a remand of this action and in affirming the Trial Court's action on the motions for Summary Judgment, has rendered a decision in conflict with decisions of other Circuit Courts, and the United States Supreme Court. The decisions referred to herewith, are cited under IV. For a more detailed discussion of this point, see the supporting brief attached.

(B) QUESTION OF DECISION ON IMPORTANT QUESTIONS OF LOCAL LAW IN A WAY PROBABLY IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

Did the Circuit Court err in affirming the decision of the

Federal District Court of Kansas, wherein the Trial Court sustained a plea of res judicata in holding that the former action filed by Ben Preston and the judgment of the courts thereon was an effective adjudication of this action and that he would not be permitted to file a new action supplying the defects omitted in the pleadings, in the original case, as is permitted under the local law of Kansas?

McClung vs Hohl, 10 K. A. 93, 61 Pac. 507.

Penquite vs General Accident and Life Insurance Company, 126 Kan. 511, 268 Pac. 851.

Burris vs Burris, 34 Pac. 2d 127.

(C) QUESTIONS OF FACTS PRESENTED

Did the Circuit Court err in approving the judgment of the Federal District Court of Kansas, in finding and holding that diversity of citizenship existed between the petitioner and the respondents herein, and that a separable controversy existed between the petitioner and each of the respondents herein so as to permit this action to be removed from the State Court of Kansas to the National Court?

Did the Circuit Court err in holding that the facts pled in the action prosecuted by Ben Preston, through the Federal Courts constituted a complete bar to his recovery in this action, and that the matters sought to be litigated in this action have been previously adjudicated?

Did the Circuit Court err in stating as a matter of fact, that:—"the court in the first case did more than enter an order dismissing the complaint, it entered a judgment against the Appellant and in favor of the appellees on the merits?"

(D) REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

(1) The Circuit Court has entered an erroneous decision contrary to, and in conflict with decisions of other Circuit Courts and this honorable court on the same questions. We list here, briefly, the reasons and some of the authorities presented under this hearing, with which we deal more in detail in the attached brief in support of this petition.

The Circuit Court refused to remand this action to the State Court holding that there existed diversity of citizenship and a separable controversy as to each removing defendant. We believe that the court's decision on this question is in conflict with the following decisions of other Federal Courts and the United States Supreme Court and Federal Statutes:

U.S.C.A., Title 28, Section 71. Mass and S. Construction Co. vs. Cane Creek. 155 U. S. 285, 39 L. Ed. 152.

Salem Company Vs Manufacturers Co., 264 U. S. 190, 68 L. Ed. 628.

Niles-Bement Vs Iron Moulders' Union. 254 U. S. 80, 65 L. Ed. 145.

Torrence Vs. Shedd. 144 U. S. 527; 36 L. Ed. 528.

Louisville & Nashville R. R. Co. Vs Ide, 114 U. S. 52, 29 L. Ed. 63.

Fidelity Insurance Co. Vs Huntington, 117 U. S. 280, 29 L. Ed. 898.

Watson vs Chevrolet Motor Co., 68 Fed. 2d 686 (8th Circuit).

American Automobile Ins. Co. Vs Freundt 103 Fed. 2d 613 (7th Circuit)

Tielman Vs Russo Asiatic Bank, 51 Fed. 2d 1023 (2nd Circuit).

Vandevanter vs C. & O. Ry. Co., 160 U. S. 653, 43 S. Ct. 230, 67 L. Ed. 443.

110 A L R 189 (Citing Federal Decisions)

Clay Vs Field, 138 U. S. 479

Stemmler Vs McNeill, Et Al., 102 Fed. 660 (Circuit Court N. C.)

Murphy Et Al. Vs Johnson, 49 Fed. 2d 410 (U.S. District Court of Texas citing decisions of U. S. Supreme Court).

The Circuit Court also held that the issues in this case had been formerly adjudicated in the former action and denied the petitioner herein the right to maintain this case upon the new petition filed by him, in which there was supplied the essential allegations ommitted from the complaint in the first action. The court held that the first action was a bar to the second one. It also held that the case had been determined on its merits. Such conclusions are contrary to the following authorities:

Allen Vs Garnett, 100 Fed. 2d 555 (Tenth Circuit)

Hughes Vs United States, 71 U. S. 232.

United States Vs New Amsterdam Casualty Co., 55 Fed. 2d 377 (Tenth Circuit)

Henrietta S. Gould, Administratrix Vs Evansville &

Crawfordville Railway Company U. S. Supreme Court Reports, 23 L. Ed. 416.

Homer Vs Brown, 14 L. Ed. 975.

Gillmer vs Morris, 46 Fed. 333 (Circuit Court, Ala.)

The Circuit Court in so holding, decided an important question of local law in a way probably in conflict with the local decisions of the Supreme Court of Kansas, applicable to the question involved, some of which decisions are as follows:

McClung Vs Hohl, 10 K.A. 93; 61 Pac. 507

Penquite Vs General Accident and Life Ins. Co., 126 Kan. 511; 268 Pac. 851.

Burris Vs Burris, 34 Pac. 2d 127.

The above Kansas Authorities hold that the sustaining of a demurer and dismissing the action does not preclude a subsequent suit upon the same cause of action where the demurrer raised formal defects; lack of jurisdiction, misjoinder of parties, or some other cognate imperfection and where the demurrer is sustained and the action dismissed because of a defect in the pleadings not going to the merits of the case, the judgment of dismissal is not a bar to another suit wherein the defect is supplied.

The above decisions of the Supreme Court of Kansas give the petitioner herein the right to maintain this action and the Circuit Court refused to follow the holding of the decisions of the State Court in this regard.

No IV PETITIONER'S BRIEF ANNEXED HERETO IS MADE A PART OF THIS PETITION.

The petitioner annexes hereto his brief in support of this petition for a writ of certiorari and by reference incorporates the same in and makes it a part of this petition. He

respectfully requests that each and every statement and the argument and citation of authorities contained therein be considered by this honorable court, as applying to and substantiating the summary statements, and conclusions of facts and law embodied in this petition.

No. V. PRAYER FOR RELIEF

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this honorable court directed to the United States Circuit Court of Appeals, Tenth Circuit, commanding that court to certify and send to this honorable court for its review and consideration on a day certain to be therein named, a full and complete transcript of the record and all the proceedings and judgments in the case of Ben Preston, Apellent Vs Bunker Hill State Bank, Bunker Hill, Kansas Et Al, Appellees No. 2422 in said court; and that the opinions, decrees and judgments of the United States Circuit Court of Appeals, Tenth Circuit, rendered in said cause be reversed by this honorable court and that your petitioner have such other and further relief in the premises as may be just and proper.

AND, your petitioner will ever pray.

Respectfully submitted,

By

O. B. Martin,
314 Hays-Kennedy Bldg,
Blackwell, Oklahoma

Albert L. Orr,
Medicine Lodge, Kansas
Counsel for Petitioner